IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1629 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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PRADHANJI TAKHAJI THAKORE - Applicant(s)
Versus
STATE OF GUJARAT & 6 - Respondent(s)

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Appearance :
MR BHARAT T RAO for Applicant(s) : 1,
MR M.R.MENGDEY, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
None for Respondent(s) : 2 - 7.

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 19/09/2007

ORAL JUDGMENT

1. By way of this petition under Article 226 of the Constitution of India the petitioner has prayed for an appropriate Writ, direction and/or order

directing respondent No.2 – Home Secretary, State of Gujarat to register complaint against respondent Nos. 3 to 7. It is also further prayed to direct the District Superintendent of Police to personally investigate the matter and file necessary charge-sheet for the contravention of the provisions of the Prevention of Insults to National Honour Act and the Flag Code of India.

2. It is the case on behalf of the petitioner that he was Sarpanch of Village – Randala and also Taluka Delegate of the Congress (I) Party and he also contested the Taluka Panchayat Election. It is the case on behalf of the petitioner in the petition that he was intimated by the Talati of Village Randala that the flag hoisting ceremony on the Independence Day is to be organized in the Office of Mamlatdar, Visnagar at 9.00 a.m. on 15.08.2007 and all were invited to remain present in the said programme. According to the petitioner he reached the place at 8.30 a.m. for participating in the flag hoisting ceremony at 9.00 a.m. However, Mamlatdar and Assistant Collector did not turn up at 9.00 a.m. at the place and all the people to come there were viz.

Members of Taluka Panchayat, Sarpanchas of various villages, leading community leaders of Visnagar Town and Taluka, School Teachers, students, merchants etc. It is the case on behalf of the petitioner that as neither Mamlatdar nor the Assistant Collector remained present at 9.00 a.m. for the Flag Hoisting Ceremony, the people who were gathered at the said programme, decided to perform the flag hoisting ceremony and accordingly all the people present at the occasion performed flag hoisting ceremony at 9.15 a.m. and gave salute to the national flag and also sang the national anthem. It is the case on behalf of the petitioner that about 12.00 O'clock the Mamlatdar came to Mamlatdar Office with the Assistant Collector and local Member of Legislative Assembly (M.L.A.) who are the respondents herein and directed the Police Officer to take out the flag which is not permissible. Not only that his subordinate Officer while taking out the flag has allowed the flag to touch on the ground, in this way they have committed the offences punishable under the provisions of Prevention of Insults to National Honour Act, 1971 and Flag Code of India. It is the case on behalf of

the petitioner that the Mamlatdar and Assistant Collector who are Government Officers were supposed to know the Flag Code of India and being Government Officers they are well aware that once the flag has been hoisted, it cannot be lowered down until sunset. However, both the Officers to satisfy the ego of local M.L.A. Of Visnagar acted in contravention of the provisions of the Flag Code of India, 2002 and the Prevention of Insults to National Honour Act, 1971 and Amendment of 2003. It is the case on behalf of the petitioner that as the act of the Mamlatdar and Assistant Collector is against the provisions of law, to overcome from the situation, the Mamlatdar and Assistant Collector filed complaint at Visnagar Police Station alleging against the persons who had hoisted the flag. It is the case on behalf of the petitioner that on coming to know about the insult to national flag and that any citizen can file the complaint, the petitioner who was present filed the complaint with the Visnagar Police Station on 17.08.2007. However, the Police Officer, Visnagar Police Station did not accept the complaint. Therefore, the petitioner had send the complaint by

Regd. Post AD to the Police Inspector, Visnagar and concerned D.S.P. However, the Police Officer is not registering the complaint and no steps are taken to register the complaint as FIR against the Mamlatdar and Assistant Collector and others, therefore, the petitioner has preferred the present petition for the aforesaid reliefs.

3. Mr.B.T.Rao, learned Advocate appearing on behalf of the petitioner has vehemently submitted that once Mamlatdar had invited for flag hoisting ceremony at 9.00 a.m. On the independence day, the Mamlatdar cannot change the time once it is declared because it is question of nation pride and national importance and if it was not convenient to him he should have asked Dy. Mamalatdar or next Officer subordinate to him to complete the flag hoisting ceremony. It is further submitted by him that in the entire Flag Code of India though there is no specific time to flag hoisting but as per the national policy flag hoisting ceremony is to be completed by 9.00 a.m. and thus the Mamlatdar has not discharged his statutory function of flag hoisting. It is further submitted by him that Assistant Collector who is an

I.A.S. Officer is also equally negligent and acted with negligence by not remaining present at 9.00 a.m. in the flag hoisting ceremony. Mr.Rao, learned Advocate appearing on behalf of the petitioner has further submitted that neither the Mamlatdar nor the Assistant Collector remained present at 9.00 a.m. for flag hoisting ceremony and the people who had gathered at the place decided to perform the flag hoisting ceremony and completed the flag hoisting ceremony at 9.15 a.m. and to save the skin, though once flag hoisting ceremony is completed it cannot be lowered down until sunset, both the aforesaid Officers acted in contravention of the Prevention of Insults to National Honour Act, 1971 lowered down the flag and again completed the flag hoisting ceremony. During the same some of his Subordinate Officer while taking out the flag has allowed the flag to touch on the ground. Therefore, it is submitted that when it is insult to the national flag and when Mamlatdar and Assistant Collector who are Government Officers have committed the offence more particularly under the provisions of Prevention of Insults to National Honour Act, 1971 and the Flag Code of India, 2002,

the Police Officer of the Visnagar Police Station was duty bound to register the complaint as FIR and ought to have further investigated the case. Therefore, it is requested to allow the present Special Criminal Application by directing the Home Secretary, State of Gujarat to register the complaint against respondent Nos.3 to 7.

4. On the other hand, Mr.M.R.Mengdey, learned APP while opposing the present petition has submitted that as such there are disputed question of fact which requires further inquiry and therefore, present petition under Article 226 of the Constitution of India may not be entertained and appropriate remedy is to file private complaint under Section 190 of the Criminal Procedure Code before the concerned learned Magistrate who can either hold inquiry personally or direct the concerned Police Officer or any other to hold inquiry as required under Section 202 of the Criminal Procedure Code and/or he may direct inquiry under Section 156(3) of the Criminal Procedure Code and thereafter after inquiry and submission of report cognizance can be taken and if case is made out, summons can be issued against the accused persons.

He has relied upon the decision of the Hon'ble Supreme Court in the case of **Aleque Padamsee and Ors. V/s. Union of India** *reported in* **(2007) 6 SCC 171**, decision of the Hon'ble Supreme Court in the case of **Prakash Singh Badal and Anr. v/s. State of Punjab and Ors.** reported in *(2007) 1 SCC 1,* as well as recent decision dated 25.07.2007 of this Court rendered in Special Criminal Application No. 588 of 2007. It is submitted that as it born out from the record that one flag hoisting ceremony was to be performed at Mehsana and the said function was main function, Hon'ble Chief Minister was the Chief Guest and Officers were to go there, therefore, timings were changed in advance and all were informed with regard to the same and even as appears from the record advertisement was given in the local newspaper and in fact other persons belonging to the group of the petitioner illegally completed the flag hoisting ceremony for political reason against whom FIR/complaint is already filed and present complaint is a counter blast to the same and present complaint has been filed. It is submitted that the petitioner has not come out with clean hands and has filed

impugned complaint with *mala-fide* intention. Therefore, it is requested to dismiss the present petition and requested not to exercise powers under Article 226 of the Constitution of India.

5. Heard the learned Advocates appearing on behalf of the respective parties.

6. At the outset this Court is not expressing any opinion on merits whether any offence as alleged have been committed by the respondents or not. There cannot be two views and/or doubts with regard to respect to the national flag as contended by the petitioner in the petition. It also cannot be disputed that one has to respect national flag. However, the question which is required to be considered is to issue appropriate Writ, direction and order directing the Home Secretary, State of Gujarat to register the complaint against the respondent Nos. 3 to 7 in exercise of powers under Article 226 of the Constitution of India. It is the case on behalf of the petitioner that as per the 'Invitation Card' flag hoisting ceremony on the Independence Day was to be organized at Visnagar at 9.00 a.m. and all were invited in the said programme.

However, the Mamlatdar and Assistant Collector did not turn up at 9.00 a.m. and all the people who were gathered at the flag hoisting ceremony decided to perform flag hoisting ceremony at the scheduled time and completed the flag hoisting ceremony at 9.15 a.m. Now it appears from the press report upon which reliance has been placed by the petitioner which are annexed with the petition that as the State of Gujarat was celebrating Independence Day at Mehsana and as it was the main programme in the State of Gujarat which was to be performed in the presence of Hon'ble Chief Minister, therefore, it was decided to change the timing and decided to perform flag hoisting ceremony at 11.30 a.m. And even advertisement was given in the local newspaper 'Sandesh'. At this stage Mr.Rao, learned Advocate appearing on behalf of the petitioner is disputing that such advertisement was given. Thus it is question of inquiry whether such advertisement was given or not and whether people at large were informed with regard to change of timings or not. It also appears that though flag hoisting ceremony was to be performed by the Mamlatdar and Assistant

Collector in presence of local M.L.A., some persons belonging to the petitioner's group unilaterally and of their own performed flag hoisting ceremony and; that criminal complaint is already filed against those accused persons for the offences punishable under Sections 143, 186, 188 and Section 2 of the Prevention of Insults to National Honour Amendment Act, 2002. Said complaint/FIR being C.R.No.I-266 of 2007 is registered with Visnagar Police Station at 2.40 p.m. on 15.08.2007 itself and thereafter, the present complaint has been filed by the petitioner after two days.

7. It is the contention on behalf of the respondents that the complaint by the petitioner is nothing but a counter blast. However, at this stage this Court is not expressing any opinion with regard to the same and whether the petitioner has filed the complaint with *mala-fide* intention or not. Some and substance of the grievance made by the petitioner is that though the petitioner has filed complaint with the Visnagar Police Station; that copy of the same is sent to the D.S.P., the complaint is not registered as FIR. Therefore, it is prayed to direct the Home

Secretary, State of Gujarat to register the complaint against respondent Nos. 3 to 7.

8. At the outset it is required to be noted that under the provisions of the Criminal Procedure Code, FIR is not required to be registered by the Secretary, Home Department. Under Section 154 of the Criminal Procedure Code, on the basis of the information given FIR is to be registered by the Police Officer of the concerned Police Station and if there is any failure on his part, then informant can approach concerned D.S.P. as required under Section 154(3) of the Criminal Procedure Code. Under the circumstances no relief can be granted to the petitioner directing the Home Secretary to register the complaint as FIR against respondent Nos. 3 to 7 that too in exercise of powers under Article 226 of the Constitution of India.

Law on the point with regard to direction to register the complaint as FIR is now not *res-integra*. Hon'ble Supreme Court in the case of ***Prakash Singh Badal(Supra)*** in para 73 the Hon'ble Supreme Court has observed as under :

'At this stage it needs to be clarified that the obligation to register a case is not to be confused with the remedy if same is not registered. Issue of the remedy has been decided by this Court in several cases. (See Gangadhar Janardan Mhatre v. State of Maharashtra).'

9. Even thereafter in recent decision in the case of ***Aleque Padamsee (supra)*** considering earlier decisions of the Hon'ble Supreme Court, the Hon'ble Supreme Court has held that appropriate remedy for the informant in case of not registering of FIR is to file private complaint under Section 190 of the Criminal Procedure Code and direction under Article 226 of the Constitution of India is not required to be issued and informant is required to be relegated to file private complaint under Section 190 of the Criminal Procedure Code. Relying upon the said decision, this Court has also taken same view. This Court has also directed the informant to file private complaint under Section 190 of the Criminal Procedure Code. Now considering the facts of the case on hand, it appears to the Court that there are disputed question which requires further inquiry before FIR is registered against the alleged accused persons and/or any cognizance is taken and that can be done if

complaint is filed under Section 190 of the Criminal Procedure Code. As and when such private complaint under Section 190 of the Criminal Procedure Code is filed, the concerned learned Magistrate may inquire into the same or direct some concerned P.I. to hold inquiry either under Section 156(3) or Section 202 of the Criminal Procedure Code and after inquiry if any case is made out then charge-sheet will be filed or report will be send to the learned Magistrate who can issue process/summons against the accused persons and if after inquiry it is found that no case is made out in that case the concerned I.O. will submit the appropriate report which can be considered by the learned Magistrate.

10. Under the circumstances, and for the reasons stated above, present petition under Article 226 of the Constitution of India to issue direction to the Home Secretary, State of Gujarat to register complaint against respondent Nos. 3 to 7 is not required to be granted. It will be open for the petitioner to file appropriate private complaint as observed herein above which can be considered in accordance with law and on its own merits and

considering the provisions of Criminal Procedure Code. Under the circumstances, this petition requires dismissal and accordingly it is dismissed.

[M.R.Shah, J.]

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